Petition

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

SUSAN MAZUREK,

Petitioner,

vs.

FREDERICK W. MILLER, Attorney-Chairman, and JEFFREY L. KRAVAT, Director of the Formal Patients Compensation Panel, ST. CLARE HOSPITAL, DR. S. C. RIESE, DR. DON G. TRAUL, DR. JOHN E. INMAN, DR. JAMES R. STURMONT, DR. EGBERT KAMSTRA and MONROE CLINIC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF WISCONSIN, DISTRICT IV

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

SUSAN MAZUREK,

Petitioner,

v.

FREDERICK W. MILLER, Attorney-Chairman, andJEFFREY L. KRAVAT, Director of the Formal PatientsCompensation Panel, ST. CLARE HOSPITAL, DR. S. C. RIESE, DR. DON G. TRAUL, DR. JOHN E. INMAN, DR. JAMES R. STURMONT, DR. EGBERT KAMSTRA and MONROE CLINIC,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF WISCONSIN,
DISTRICT VI

QUESTIONS PRESENTED FOR REVIEW

I.

DOES A PERSON HAVE A CONSTITUTIONAL RIGHT TO CONTROL HER BODY FROM INVASIVE TESTING?

II.

IS DUE PROCESS OF LAW DENIED WHEN A STATE MEDICAL MALPRACTICE PANEL DISMISSES A CLAIM FOR THE REFUSAL TO SURRENDER SAID RIGHT AND WITHOUT AFFORDING THE CLAIMANT AN OPPORTUNITY FOR COURT REVIEW?

PARTIES

The parties are specified in the caption. Petitioner SUSAN MAZUREK shall be referred to herein as "Mazurek" or "petitioner". FREDERICK W. MILLER and JEFFREY L. KRAVAT are officials of Wisconsin's Formal Patient's Compensation Panel ("Panel") and shall be referred to herein as "chair" and "director", respectively, and as "defendants", collectively. ST. CLARE HOSPITAL, DR. S. C. RIESE, DR. DON G. TRAUL, DR. JOHN E. INMAN, DR. JAMES R. STURMONT, DR. EGBERT KAMSTRA and MONROE CLINIC shall be referred to herein as "respondents".

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OPINIONS BELOW

The Supreme Court of Wisconsin's order denying petitioner's Petition To Appeal, as yet unreported, is attached hereto as Appendix A. The decision of the Court of Appeals of Wisconsin, District IV, as yet unreported, is attached hereto as Appendix B, and is referred to herein as "Decision". The order, ruling on motion, and ruling on motion to quash alternative writ of mandamus of the Circuit Court of Dane County, Wisconsin, unreported, are attached hereto as Appendix C. The Panel order by the defendant chair granting respondents' motion for medical examination is referred to herein as "June 26 Order" and the order by both defendants dismissing petitioner's claim with prejudice is referred to herein as "August 28 Order". Both orders are unreported and attached hereto as Appendix D.

JURISDICTION

The Decision was filed on January 27, 1981, and the Supreme Court of Wisconsin's order denying petitioner's Petition to Appeal was entered on May 11, 1981. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. Sec. 1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

The Ninth Amendment to the Constitution of the United States provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. U.S. CONST. amend. IX.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend XIV, Sec. 1.

Federal Rule of Civil Procedure 35(a) provides:

> Order of Examination. When the mental or physical condition (including the blood group) of the party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Fed. R. Civ. P. 35(a).

The Wisconsin Statutes, Sections 655.17(3), 655.19(1) and 804.10(1) are attached hereto as Appendix E.

STATEMENT OF THE CASE

On September 6, 1978, Mazurek filed a claim with the Panel for compensation arising from medical malpractice against the respondent health care providers pursuant to Chapter 655 of the Wisconsin Statutes. On June 19, 1979, during discovery before the Panel, the respondents moved the Panel to enter an order compelling Mazurek's submission to a physical examination by the respondents' expert witness. The chair of the Panel, over Mazurek's objection, granted this motion on June 26, 1979. The June 26 Order provided for respondents' expert witness:

> "(1) to take relevant history from the claimant;
>
> (2) to perform what medical tests he deems necessary; and

(3) to conduct the examination outside the presence of claimant's attorney."

Mazurek did submit to an examination by respondents' expert witness but refused to undergo electromyograph and nerve conduction tests demanded by the expert witness.

On July 11, 1979, the chair of the Panel issued an order to show cause why Mazurek's claim should not be dismissed for failure to comply with the June 26 Order. Mazurek objected that: (1) her rights of privacy and counsel would be violated if she submitted to the Order; (2) the tests were not necessary; and (3) the Panel had no power to dismiss a claim with prejudice unless it first applied to the circuit court. On August 28, 1979, however, the defendants dismissed Mazurek's claim with prejudice.

On August 31, 1979, Mazurek petitioned the Circuit Court of Dane County, Wisconsin, for an alternative writ of

mandamus. On February 1, 1980, the circuit court quashed the petition. Mazurek moved the circuit court to reconsider on constitutional grounds, but the motion was denied in the circuit court's ruling on motion. The ruling does not refer to the content of petitioner's motion; it merely denies "Petitioner's motion to reconsider and the accompanying brief," and "[t]he offer of petitioner to furnish the court with additional authority . . . . particularly on the constitutional issues involved." On March 6, 1980, the same day it ruled on the petitioner's motion to reconsider, the circuit court dismissed Mazurek's petition for alternative writ of mandamus. The aforesaid motion to reconsider is contained in the record before the Court of Appeals of Wisconsin, District IV, as the supplemental record.

The Court of Appeals of Wisconsin, District IV, affirmed the circuit court without the requested oral argument on

January 27, 1981. Mazurek's "Appellant's Brief, Argument I" and "Reply Brief of Appellant, Argument II" contain her constitutional contentions in essentially the same form as they are now presented to this Court.

Mazurek petitioned the Supreme Court of Wisconsin to reverse the Court of Appeals upon her constitutional contentions and separate statutory contentions. The petition was denied on May 11, 1981, without comment or decision on the merits.

ARGUMENTS IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI

"Special and important reasons" are presented herein for this Court to review the Decision and orders entered in the instant action. Supreme Court Rule 17. Twenty-nine states, including Wisconsin, have responded to the "medical malpractice crisis" by establishing mandatory or voluntary panels similar to Wisconsin's Panel.[1] In eight states, the panels or

some aspect thereof have been found to violate the Fourteenth Amendment or state constitutions.[2] These decisions are only summarily described herein because of the limitations of Supreme Court Rule 21(4), but will be fully analyzed

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[1] See, generally: ALA. CODE Secs. 6-5-480 et seq.; ALASKA STAT. Secs. 09.55.530 et seq.; ARIZ. REV. STAT. ANN. Ch. 4, Secs. 12-567 et seq.; ARK. STAT. ANN. Secs. 34-2601 et seq.; DEL. CODE ANN. tit. 18, Secs. 6801 et seq.; FLA. STAT. Secs. 768.44 et seq.; GA. CODE Secs. 7-401 et seq.; HAWAII REV. STAT. Secs. 671-1 et seq.; IDAHO CODE Secs. 6-1001 et seq.; ILL. REV. STAT. Ch. 110, Secs. 58.1 et seq.; IND. CODE Secs. 16-9.5-9-1 et seq.; KAN. STAT. ANN. Secs 65-4901 et seq.; LA. REV. STAT. ANN. Secs. 40:1299.47 et seq. (West); MD. CJ CODE ANN. Secs 3-2A-01 et seq.; MASS. GEN. LAWS ANN. Ch. 231, Secs. 60B et seq.; MICH. COMP. LAWS Secs. 24.13051 et seq.; MO. REV. STAT. Secs. 538.01 et seq.; NEV. REV. STAT. Secs 41A.010 et seq.; N. H. REV. STAT. ANN. Secs. 507-C:1 et seq.; N. M. STAT. ANN. Secs. 41-5-1 et seq.; N. Y. JUD. LAW Secs. 198-a et seq.; N. D. CENT. CODE Secs. 32-29.1 et seq.; OHIO REV. CODE ANN. Secs. 2305.27, 2307.42 and 2711.21 et seq. (Page); 40 PA. CONS. STAT. Secs. 1301.101 et seq.; R. I. GEN. LAWS Secs. 10-19-1 et seq.; S. D. CODIFIED LAWS ANN. Secs. 21-258-1 et seq.; TENN. CODE ANN. Secs. 23-3401 et seq.; VT. STAT. ANN. tit. 12, Secs. 7000 et seq.; and VA. CODE Secs. 8.01-581.1 et seq.

[2] These cases are cited in state alphabetical order: Aldana v. Holub, 381

in petitioner's brief should this Court grant this petition.

The petitioner's plight is more compelling than any of the reported court

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So. 2d 231 (Fla. 1980) (panel time limitation violates due process clauses of United States and Florida Constitutions); Wright v. Central DuPage Hospital Ass'n., 63 Ill. 2d 313, 347 N.E. 2d 736 (1976) (panel violates Illinois Constitutional provisions concerning delegation of judicial function, jury trial and special legislation); State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner, 583 S.W. 2d 107 (Mo. 1979) (panel violates Missouri Constitution provision concerning access to the courts); Carson v. Maurer, _____ N.H. _____, 424 A. 2d 825 (1980) (panel violates New Hampshire Constitution provision concerning equal protection); Arneson v. Olson, 270 N.W. 2d 125 (N.D. 1978) (statute restricting cause of action for medical malpractice violates due process and equal protection provisions of North Dakota and United States Constitutions); Graley v. Satayatham, 74 O.O. 2d 316 (Ohio Com. Pl. 1976) and Simon v. St. Elizabeth Medical Center, 3 O.O.3d 164, 355 N.E. 2d 903 (Ohio Com. Pl. 1976) (panel violates provisions of Ohio and United States Constitutions concerning equal protection, trial by jury and due process); Mattos v. Thompson, _____ Pa. _____, 421 A.2d 190 (1980) (panel violates Pennsylvania Constitution provisions concerning trial by jury); and Morris v. Gross, _____ Tenn. _____, 572 S.W.2d 902 (statute revising panel violated provisions of the Tennessee and United States Constitutions concerning due process).

decisions involving medical malpractice panels. The defendants have denied her the right to present a claim before the Panel because she refused to surrender her fundamental right to control her own body. The defendants have been authorized to do so by the decision challenged herein without affording the claimant an opportunity for a court hearing. Petitioner contends that WIS. STAT. Sec. 655.17(3), as interpreted by the Wisconsin courts and applied by the defendants, violates the Fourteenth Amendment.

Petitioner has been unable to obtain judicial review of the defendants' August 28 Order because, "[t]o hold that a litigant is entitled to pursue his claim in court after the panel dismisses it with prejudice might encourage litigants to bypass the panels by refusing to cooperate with them." Appendix B, Decision, p. 18, n. 3. Thus, the defendants have posed the petitioner a Hobson's choice which violates

due process: forfeit her fundamental right to control her own body or forfeit her claim for malpractice.

In spite of her active, good faith prosecution, the petitioner has been denied a hearing on the merits of her claim.

I.

PETITIONER HAS A FUNDAMENTAL RIGHT TO CONTROL HER OWN BODY

Petitioner has been unconstitutionally deprived of her property--her claim for malpractice. The reason she was not allowed to present her claim is that she would not submit to electromyograph and nerve conduction tests demanded by respondents' expert witness.

This Court has long championed the individual's right to control his or her own body. Union Pacific Railway v. Botsford, 141 U.S. 250, 251-52 (1891), wherein this Court stated:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every

> individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."
>
> * * *
>
> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. (Emphasis added.)

See, e.g., Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Botsford); Griswold v. Connecticut, 381 U.S. 479 (1965); and Rochin v. California, 342 U.S. 165 (1952). The petitioner's right of personal privacy is founded upon the Fourteenth Amendment's concept of personal liberty, the Ninth

Amendment's reservation of rights to the people, and the Fourth Amendment's protection against unreasonable searches.

The right to control one's own body is, of course, subject to reasonable regulation and exists in harmony with counterveiling rights. See, e.g., Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1941). Rule 35 of the Federal Rules of Civil Procedure and WIS. STATS. Sec. 804.10 create reasonable methods of balancing the conflicting rights of medical malpractice litigants. WIS. STAT. Sec. 655.17(3), relied upon by defendants for their authority, does not. See, Argument II, infra.

The Court of Appeals of Wisconsin has based its decision upon a long-rejected argument that petitioner has waived her right to object because she put her condition in issue upon filing the claim. Appendix B, Decision, p. 14, citing Sibbach, supra. This Court, in

Schlagenhauf v. Holder, 379 U.S. 104, 114 (1964), laid this waiver argument to rest:

> These statements demonstrate the invalidity of any waiver theory. The chain of events leading to an ultimate determination on the merits beings with the injury of the plaintiff, an involuntary act on his part. Seeking court redress is just one step in this chain. If the plaintiff is prevented or deterred from this redress, the loss is thereby forced on him to the same extent as if the defendant were prevented or deterred from defending against the action.
>
> Moreover, the rationalization of Sibbach on a waiver theory would mean that a plaintiff has waived a right by exercising his right of access to the federal courts. Such a result might create constitutional problems. Also, if a waiver theory is espoused, problems would arise as to a plaintiff who originally brought his action in a state court (where there was no equivalent of Rule 35) and then has the case removed by the defendant to federal court. (Emphasis added.)

The petitioner did not waive her constitutional rights by filing her claim. She did not ask to be injured by the respondents' malpractice.

The safeguards embodied in Rule 35 and WIS. STATS. Sec. 804.10 include a required showing of good cause and a specified scope

of examination. These safeguards exist to protect a person's privacy rights. See, Schuppin v. Unification Church, 435 F. Supp. 603, 606 (D. Vt. 1977) and Marroni v. Matey, 82 F.R.D. 371, 372 (E.D.Pa. 1979). The power of courts to order invasive tests is to be carefully applied. "Mental and physical examinations are only to be ordered upon discriminating application by the district judge of the limitations prescribed by the rule. To hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases." Schlagenhauf, supra, 379 U.S. at 121-22.

Thus, petitioner has a constitutionally protected right to control her own body. Botsford, supra, 141 U.S. at 251-52; Roe, supra, 410 U.S. at 152. This right is recognized by the safeguards embodied in reasonable statutes such as Rule 35 of the Federal Rules of Civil Procedure and WIS. STAT. Sec. 804.10.

Schlagenhauf, supra, 379 U.S. at 115-22 and Marroni, supra, 82 F.R.D. at 372. As petitioner explains in Argument II, the defendants have deprived her of property by dismissing her claim without abiding by the aforesaid safeguards and thereby without due process of law.

II.

PETITIONER WAS DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW

Petitioner was precluded from obtaining judicial review of the August 28 Order dismissing her claim with prejudice. As the Court of Appeals of Wisconsin stated in its Decision, "[w]e do not read this language in Mortenson [v. Miller, 99 Wis. 2d 209, 298 N.W. 2d 546] as holding that any order which terminates panel proceedings, including an order dismissing a claim for failure to comply with discovery rules, automatically allows the petitioner to pursue his claim in court . . . . To hold that a litigant is entitled

to pursue his claim in court after the panel dismissed it with prejudice might encourage litigants to bypass the panels by refusing to cooperate with them." Appendix B, Decision, p. 18, n. 3.

Nor could petitioner receive judicial review of the June 26 Order alone. The only provision of Chapter 655 which provides for court review of a Panel order is WIS. STAT. Sec. 655.19(1), providing for the same trial de novo the Court of Appeals of Wisconsin found to be forbidden in the petitioner's appeal. No statute provides for interlocutory review of a Panel order.

Petitioner attempted to mandamus the defendants to hear her claim upon the merits. Incredibly, the circuit court found that "petitioner has no clear legal right to a hearing". Appendix C, Ruling on Motion to Quash Alternative Writ of Mandamus, p. 23. This view was affirmed by the Decision.

The statutory authority asserted below for the defendant chair's June 26 Order is WIS. STATS. 655.17(3). As one respondent asserted before the Court of Appeals of Wisconsin, "[t]he statute formally makes no requirement of a controversy or good cause, but leaves this with the discretion of the panel." Brief of Intervening Respondent Monroe Clinic at 9. No standards are provided in WIS. STAT. 655.17(3). This statute, as construed in the Decision and applied by the defendants, denied petitioner due process of law.

The defendants have disregarded these safeguards previously referred to herein (supra, Argument I at 22-23) and the petitioner's rights. The Court of Appeals of Wisconsin affirmed their view: "We conclude that there is no constitutional difficulty under the facts of this case with requiring a person seeking compensation for injuries to undergo an independent medical examination for the

benefit of the adverse parties." Appendix B, Decision, p. 15. An examination by respondents' expert witness is not "independent", nor should a physically invasive test be ordered merely because an adverse party requests one.

Petitioner's due process right is best characterized as "structural due process". L. Tribe, AMERICAN CONSTITUTIONAL LAW at 1140-46, Secs. 17-2, 17-3 (1978); Tribe, Structural Due Process, 10 Harv. Civ. Rts.--Civ. Lib. L. Rev. 269 (1976). Due process of law requires "leaving room for rebuttal and discretionary adjustment where mandatory per se rules are . . . too insensitive to personal differences in matters of great moment, ..." AMERICAN CONSTITUTIONAL LAW, supra, at 1145. The June 26 Order was issued simply upon respondents' motion; there were no showings of "in controversy", or "good cause" or a specified "scope", as is required by Rule 35 of the Federal Rules of Civil Procedure,

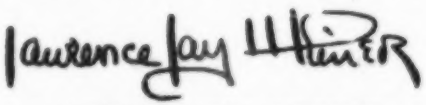
WIS. STAT. 804.10 and the Constitution of the United States. The petitioner could not rebut the respondents' motion by showing that the motion did not fulfill standards because there were no standards. Electromyograph and nerve conduction tests are certainly "matters of great moment".

Therefore, the petitioner has been deprived of property without due process of law.

CONCLUSION

Wherefore, the petitioner respectfully prays that this Court grant her petition for a writ of certiorari to the Court of Appeals of Wisconsin, District IV.

Respectfully submitted,



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No. 80-607 - Susan Mazurek v. Frederick W. Miller,
et al.

The court having considered the petitioner-appellant's petition for review from the adverse decision of district IV of the court of appeals filed January 27, 1981;

IT IS ORDERED the petition is denied. $25 costs to respondent St. Clare Hospital and Dr. S. C. Riese and $25 costs to Drs. Traul, Inman, Sturmont, Kamstra and the Monroe Clinic.

Marilyn L. Graves,
Clerk of Supreme Court

No. 80-607

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

SUSAN MAZUREK,

Petitioner-Appellant,

v.

FREDERICK W. MILLER, Attorney-Chairman, and JEFFREY L. KRAVAT, Director of the Patients Compensation Panel, ST. CLARE HOSPITAL, DR. S. C. RIESE, DR. DON G. TRAUL, DR. JOHN E. INMAN, DR. JAMES R. STURMONT, DR. EGBERT KAMSTRA and MONROE CLINIC,

Defendants-Respondents.

APPEAL from orders of the circuit court for Dane County: WILLIAM D. BYRNE, Judge. Affirmed.

Before Gartzke, P.J., Bablitch, J. and Dykman, J.

DYKMAN, J. This appeal is from an order quashing an alternative writ of mandamus and dismissing appellant's petition. Appellant also appeals from the court's denial of his motion for reconsideration.

A patient seeking to make a claim against a health care provider for injury on account of malpractice must have the matter reviewed by a patients' compensation panel before an action may be brought in court. Ch. 655, Stats; Stats ex rel. Strykowski v. Wilke, 81 Wis.2d 491, 499, 261 N.W.2d 434, 438 (1978). Pursuant to this statutory requirement, appellant filed a submission of controversy[1] against certain respondents in September of 1978. Appellant and her treating medical expert were deposed and pre-hearing conferences were conducted.

The respondents in the panel proceeding moved the panel for an order establishing the scope of an independent medical examination to be performed by Dr. Peter Eichman, a professor in the departments of neurology and medicine at the University of Wisconsin Hospital. The motion was heard by the attorney-chairman of the panel, Frederick Miller. Miller

entered an order which provided that Dr. Eichman be allowed: (1) to take a relevant history from appellant; (2) to perform what medical tests he deems necessary; and (3) to conduct the examination outside the presence of appellant's attorney.

Doctor Eichman examined appellant on June 26, 1979. Although appellant was generally cooperative in permitting Dr. Eichman to examine her, she refused to submit to Electro-myographic (EMG) and nerve conduction testing, the nature of which is not of record. She also refused to provide Dr. Eichman with a relevant medical history.

On July 11, 1979, Miller entered an order to show cause why appellant's claim should not be dismissed for failure to comply with the June 26, 1979 order. A hearing was held on July 25, 1979. Doctor Eichman submitted a report stating that he could arrive at a proper opinion of appellant's condition only by repeating

certain EMG and nerve conduction tests which had been done by appellant's own medical witness. Doctor Eichman also indicated that it was necessary for him to review appellant's relevant medical history. He pointed out that it is generally accepted that the history is perhaps the most important aspect of an analysis of neurological disorders.

Miller found that the examination which Dr. Eichman sought to conduct was reasonable in scope, and that appellant continued to refuse to submit to the full examination. Appellant's claim was ordered dismissed with prejudice. The order was signed by Miller and by Jeffrey Kravat, Director of the Patients Compensation Panel.

Appellant filed a petition for an alternative writ of mandamus on August 31, 1979. Miller and Kravat were named as defendants.[2] The petition sought to have defendants answer and show cause why

mandamus should not issue compelling them to vacate the order dismissing the action, to take no further steps to enforce the order, and to schedule the principal action for a hearing. Defendants moved to quash the writ.

The circuit court heard defendants' motion on October 16, 1979. The court filed a memorandum decision and, by order dated March 6, 1980, quashed the alternative writ of mandamus and dismissed appellant's petition. Appellant moved for reconsideration. The court denied the motion without hearing.

The following issues are raised on appeal:

(1) Did the panel have authority to dismiss appellant's claim?

(2) Did the panel follow proper procedure in dismissing appellant's claim?

(3) Did the scope of the medical examination which was ordered by the panel exceed that which was "necessary"?

(4) Does dismissal of appellant's claim deny her due process?

Mandamus is an extraordinary legal remedy. A petitioner seeking mandamus must show that his legal right to the action he seeks to compel is clear, specific, and free from substantial doubt. Eisenberg v. ILHR Department, 59 Wis.2d 98, 101, 207 N.W.2d 874, 876 (1973). Mandamus does not lie to review an exercise of discretion, although it is appropriate to compel the exercise of discretion. State ex rel. Althouse v. Madison, 79 Wis.2d 97, 106, 255 N.W. 2d 499, 453 (1977). Although the statutes which create the duty which the petitioner seeks to compel may be unclear, the fact that the statutes must be construed to determine whether the petitioner has a clear and specific legal right to have the duty performed does not render mandamus an inappropriate remedy. Althouse, 79 Wis.2d at 106, 255 N.W.2d at 453.

A motion to quash a writ of mandamus is treated as a motion to dismiss a complaint. sec. 293.01, Stats. On review of an order granting the motion to quash, the issue is whether the facts alleged in the petition state a claim. Watkins v. Milwaukee County Civil Service Comm., 88 Wis.2d 411, 419, 276 N.W.2d 775, 779 (1979).

(1) Authority to Dismiss

Appellant contends that the patients' compensation panels have a clear legal duty to hear claims on their merits. She asserts that the panels have been granted no authority to dismiss a claim for failure to comply with a discovery order.

Appellant's argument is based in part on sec. 655.065(1), Stats., which provides:

> Each panel, whether formal or informal, shall determine the following:
> (a) Whether the ations or omissions of the health care provider were negligent.
> (b) If such actions or omissions were negligent, whether the negligence caused injury or death to the patient.

We do not construe this statute as requiring a panel to resolve each claim on its merits. Statutes must be construed in light of related statutes. White Hen Pantry v. Buttke, 98 Wis.2d 119, 122, 295 N.W.2d 763, 764 (Ct.App. 1980). Section 655.16(1), Stats., provides: "All parties shall be afforded opportunity for public hearing after reasonable notice, but disposition of a controversy may be made by compromise, stipulation, agreement or default without hearing." This section demonstrates that the panels are empowered to resolve claims short of a full hearing on the merits.[3]

The panels are granted authority to dismiss a claim by virtue of sec. 655.17(1), Stats., which provides in part: "Except as otherwise provided in this chapter, a formal panel shall be bound by the law applicable to civil actions . . ." The rules of discovery applicable to civil actions include the sanctions contained in

sec. 804.12(2)(a)3, Stats. That section provides in relevant part:

> (a) If a party . . . fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10 (physical and mental examination of parties), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . . . (Emphasis added.)

Appellant argues that sec. 804.12(2)(a)3, Stats., grants the dismissal power only to a court, and that the panel was required to obtain a court order of dismissal rather than itself dismissing the claim. Section 655.17(1), Stats., however, applies the rules of civil procedure to panel proceedings. The panel acts as a "quasi-judicial" body. Strykowski, 81 Wis.2d at 521-22, 261 N.W.2d at 488-49. The powers of a court under sec. 804.12(2) are granted to a panel by virtue of sec.

655.17(1), unless provided otherwise in Ch. 655.

Appellant contends that sec. 655.17(2), Stats., requires the panel to obtain a court order to dismiss a claim. That section provides:

> Each formal panel may prescribe the procedures necessary to implement this chapter, order physical examinations under sub. (3), subpoena witnesses, administer oaths, apply to any circuit court having requisite jurisdiction to enforce the attendance and testimony of witnesses and the production and examination of books, papers and records and exercise all other powers and duties conferred upon it by law.

This section requires an application to circuit court only when the panel seeks to enforce the attendance of witnesses and the production of documents. It does not limit the power of the panel to dismiss a claim because of the claimant's failure to comply with the discovery provisions of sec. 655.17(3).[4]

Citing sec. 855.12, Stats., and State v. Balistrieri, 55 Wis.2d 513, 201 N.W.2d 18 (1972), appellant contends that only a

court can impose punishment for being in contempt of court. While the contempt sanction is available for failure to comply with a discovery order, sec. 804.12(2)(a)4, Stats., it is a sanction which is separate and distinct from the sanction of dismissal provided in sec. 804.12(2)(a)3. The dismissal was not a punishment for contempt.

We conclude that the panel has authority to dismiss appellant's claim for failure to comply with the discovery order.[5] This authority is needed if the panel is to be an efficient forum for the resolution of medical malpractice claims as the legislature intended. Mortenson v. Miller, 99 Wis.2d 209, 217, 298 N.W.2d 546, 550 (1980).

Because appellant had no clear legal right to have her claim heard on its merits, appellant's petition did not state a claim. The writ of mandamus was properly quashed.

(2) Procedure and Scope of Discovery Order

Appellant contends that the panel did not follow proper procedure in dismissing her claim. She first argues that sec. 655.05, Stats., requires a majority vote of the panel before a dismissal order can be entered. Second, she asserts that an administrative rule providing for dismissals must be promulgated pursuant to sec. 655.003 before the dismissal power can be exercised. Appellant's third procedural argument is that the discovery order improperly delegated authority to the examining physician to determine the "necessary" scope of the examination. Sec. 655.17(3). In a closely related argument appellant contends that the examination which was ordered was improper because it went beyond what was necessary, and because the panel was required to determine that the examination was necessary before ordering it.

None of these issues was raised before the court below. "It is the often-repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal." Wirth v. Ehly, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). We decline to exercise our discretion to treat these issues as an exception to the general rule.

(3) Due Process

Appellant contends that her due process interest in liberty and her right to privacy were violated by an order requiring her to undergo invasive medical testing. In support of this claim, she cites Union Pacific Railway Co. v. Botsford, 141 U.S. 250 (1891). In Botsford, the Court held that absent express legislative authority, a federal district court had no power to order a plaintiff to submit to a medical examination. In so holding the Court

stated: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Botsford, 141 U.S. at 251.

In Sibbach v. Wilson & Co., 312 U.S. 1 (1941), the Court made clear that Botsford merely held that there was no procedural authority for an order requiring a medical examination. The subsequent enactment of Fed. R. Civ. P. 35 granted Federal courts that authority. In upholding Fed. R. Civ. P. 35 against a constitutional attack similar to that made by appellant, the Court stated: "The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that, as we hold, no invasion of freedom from personal restraint attaches to refusal to comply with its provisions."

Sibbach, 312 U.S. at 14. Invasion of privacy was again rejected as an attack on Fed. R. Civ. P. 35 in Schlagenhauf v. Holder, 379 U.S. 104, 113 (1964). We conclude that there is no constitutional difficulty under the facts of this case with requiring a person seeking compensation for injuries to undergo an independent medical examination for the benefit of the adverse parties.

Appellant contends that due process at least requires that her claim not be dismissed unless she is provided with a hearing before a court. Appellant cites no authority for the proposition that due process requires her to have a hearing before a court rather than a hearing before the panel when the panel's decision can be reviewed by a court. "Due process is flexible and requires only such procedural protections as the particular situation demands." Strykowski, 81 Wis.2d at 512, 261 N.W.2d at 444. Appellant is entitled

to a judicial review of the determination of the panel. Strykowski, 81 Wis.2d at 520-21, 261 N.W.2d at 448. Due process is satisfied "if the statutory procedures provide an opportunity to be heard in court at a meaningful time and in a meaningful manner." Strykowsi, 81 Wis.2d at 512, 261 N.W.2d at 444. The availability of judicial review satisfies the requirements of due process.

Appellant contends that it was a violation of due process to delegate to the panel the power to dismiss a claim without a hearing on the merits. The delegation of judicial authority to the panels was upheld in Strykowski, 81 Wis.2d at 520-22, 261 N.W.2d at 448-49. The court there held that quasi-judicial authority may constitutionally be delegated to an administrative body. Strykowski, 81 Wis.2d at 521, 261 N.W.2d at 448. The availability of judicial review satisfies

any due process problems which this delegation might otherwise entail.

Appellant informs us that she is now ready to comply with the discovery order, that her objections were made in good faith, and that it is inequitable to prevent her from pursuing her claim. Appellant had two chances to comply with the order before her claim was dismissed. It is too late now to come before this court seeking to have her claim reinstated. It is unfortunate that appellant has lost her right to make her claim, but she was warned of the consequences of her decision not to comply with the order and made a strategic decision to disobey it. Equity will not assist her under the facts of this case.

By the Court.--Orders affirmed.

Inclusion in the official reports is recommended.

Footnotes

[1] Section 655.04, Stats.

[2] The respondents in the proceeding before the panel moved to intervene as defendants in the mandamus proceeding. Appellant stipulated to their intervention and the court ordered that the respondents would intervene as defendants.

[3] In Mortenson v. Miller, 99 Wis.2d 209, 219, 298 N.W.2d 546, 551 (1980), the supreme court stated:

> Chapter 655 requires as a prerequisite to a lawsuit that there be an order by a panel. However the order need not be on the merits. Sec. 655.19, Stats. The issuance of an order by the panel in the instant case entitles plaintiff to pursue his claim in court.

The order referred to was one which dismissed the petitioner's claim for lack of jurisdiction.

We do not read this language in Mortenson as holding that any order which terminates panel proceedings, including an order dismissing a claim for failure to comply with discovery rules, automatically allows the petitioner to pursue his claim in court. The panel in Mortenson erroneously concluded that it lacked jurisdiction over the petitioner's claim and that the petitioner's proper forum was the circuit court. That order was substantially different from a dismissal order which is intended as a sanction and which is made with prejudice. To hold that a litigant is entitled to pursue his claim in court after the panel dismisses it with prejudice might encourage litigants to

bypass the panels by refusing to cooperate with them.

[4] Section 655.17(3), Stats., provides in pertinent part:

> Upon the application of any party or upon its own motion, a formal panel may appoint a disinterested and duly qualified physician or other professional person or expert to make any necessary professional or expert examination of a claimant or relevant evidentiary matter and to report or testify as a witness in respect thereto.

[5] Whether the panel abused its discretion in ordering dismissal as a sanction is not reviewable on mandamus, State ex rel. Althouse v. Madison, 79 Wis.2d 97, 255 N.W.2d 499 (1977), and we therefore do not address that issue. Appellant has not alleged that due process was violated by ordering dismissal solely for failure to obey court orders without evidence of bad faith, cf. Dubman v. North Shore Bank, 75 Wis.2d 597, 601, 249, N.W.2d 797, 799 (1977) (per curiam) (sanction of striking a pleading would violate due process under those circumstances), and we therefore will not address the issue.

STATE OF WISCONSIN

CIRCUIT COURT DANE COUNTY

SUSAN MAZUREK,

Petitioner,

v. Case No. 79-CV-4427

FREDERICK W. MILLER, Attorney-Chairman, and JEFFREY L. KRAVAT, Director of the Patients Compensation Panel,

Defendants.

ORDER

The defendants having filed a Motion to Quash the Alternative Writ of Mandamus in this action, and the motion having come on for hearing on October 16, 1979, at which time the petitioner, Susan Mazurek, appeared by her attorneys, Richard E. Rosenberg of the firm of Nowlan and Mouat, Janesville, and Michael J. Radtke of Goldberg and Goldberg, Chicago, the named defendants appeared by Bronson C. La Follette, Attorney General, and Robert W. Larsen, Assistant Attorney General, the

defendant intervenors appeared as follows: St. Claire Hospital and Dr. D. C. Riese by attorneys Eugene O. Gehl and Curtis C. Swanson, the Monroe Clinic and Drs. Don G. Traul, John E. Inman, James R. Sturmont, and Egbert Kamstra by attorneys Robert R. Studt and Peter M. Gennrich;

And the court having considered the arguments presented at the hearing and the briefs and letters on file herein, and being fully advised in the premises;

IT IS HEREBY ORDERED that the Alternative Writ of Mandamus be, and same hereby is, quashed and that the Petition for Alternative Writ of Mandamus be, and the same hereby is, dismissed, for the reasons set forth in this court's Ruling on Motion to Quash Alternative Writ of Mandamus, dated February 1, 1980.

Dated this 6th day of March, 1980.

BY THE COURT:

William D. Byrne
Circuit Judge

STATE OF WISCONSIN

CIRCUIT COURT DANE COUNTY

Branch IX

SUSAN MAZUREK,

Petitioner,

v.

RULING ON MOTION

Case No. 79-CV-4427

FREDERICK W. MILLER, Attorney-Chairman, and JEFFREY L. KRAVAT, Director of the Patients Compensation Panel,

Defendants.

The Court has read and considered:

Petitioner's motion to reconsider and the accompanying brief.

Attorney General's letter of February 26 in opposition to petitioner's motion.

Petitioner's letter to the court of February 26 with respect to bringing the Panel's proceedings to the court as exhibits for the purpose of the court's consideration of the "substantive issues before the panel."

The offer of petitioner to furnish the court with "additional authority . . . particularly on the constitutional issues involved."

Attorney General's responsive letter dated March 4 to Attorney Richard E.

Rosenberg's letter to the court dated February 27.

Attorney Robert R. Studt's correspondence to the court.

And having been fully advised in the premises thereof, the Court:

1. Believes that the court's ruling dated February 1, 1980, on the issues presented to it to be sound and supported by law.

2. Determines no useful purpose to be achieved by the consideration of any further exhibits or additional authority to be submitted on behalf of petitioner.

3. Finds there is no reason for the court not to sign the Order Quashing the Alternative Writ of Mandamus and dismissing the Petition for Alternative Writ of Mandamus.

Therefore, the Court signed the Order on March 6, 1980.

Dated at Madison, Wisconsin, on this 6th day of March, 1980.

BY THE COURT:

William D. Byrne
Circuit Judge

STATE OF WISCONSIN

IN CIRCUIT COURT DANE COUNTY

No. 79 CV 4427

SUSAN MAZUREK,

Petitioner,

-vs-

RULING ON MOTION TO QUASH ALTERNATIVE WRIT OF MANDAMUS

FREDERICK W. MILLER, Attorney-Chairman, and JEFFREY L. KRAVAT, Director of the Patients Compensation Panel,

Defendants.

This action involves the defendants Frederick W. Miller and Jeffrey L. Kravat's (hereinafter defendants) motion to quash the alternative writ of mandamus initiated by the petitioner Susan Mazurek (hereinafter petitioner). On or about September 6, 1978, petitioner brought her claim for medical malpractice before a Formal Patient Compensation Panel (hereinafter the panel) pursuant to Chapter 655 of the Wisconsin Statutes. Defendant were members of that panel. On June 26,

1979, the panel ordered petitioner to submit to an independent physical examination. On June 26 petitioner submitted to the examination, but refused to give the doctor her medical history and to submit to nerve conduction and EMG tests despite the order's specific command that she do so. On July 11, 1979, the panel issued an order commanding petitioner to appear on July 25, 1979 to show cause why her claim should not be dismissed for failure to comply with the June 26 order. Petitioner's counsel appeared at the hearing, argued the panel had no authority to dismiss the action, and advised the panel that petitioner would not comply with the terms of the order for physical examination. On August 28, 1979, the defendants ordered that petitioner's proceeding be dismissed with prejudice.

On August 31, 1979, the Court issued an alternative writ of mandamus pursuant to Susan Mazurek's August 30, 1979 petition.

The writ commands defendants to answer and show cause why the Court should not order defendants to vacate the order dismissing the proceeding, to take no further steps to enforce their June 26 order and to promptly schedule a hearing on the merits before the panel. Defendants' September 17, 1979 motion to quash alleges that petitioner has failed to satisfy the prerequisite for the issuance of a writ of mandamus and that the panel was authorized by Chapter 655 to dismiss the proceeding. Petitioner argues the panel had no power to dismiss her claim for her failure to obey the panel's order.

The issues before the Court are (1) whether petitioner has a clear legal right to a hearing before the panel despite her refusal to comply with the terms of the panel's order for an independent medical examination, which, in turn, requires the court to determine (2) whether a formal panel has the authority to dismiss a proceeding when a claimant refuses to

comply with its order. As discussed below, the Court finds that a formal panel has the power to dismiss under these circumstances and that consequently petitioner has no clear legal right to an order compelling the panel to hear her claim.

Mandamus lies to compel the performances of specific duties imposed by law; the petitioner must show a clear legal right to the relief sought. State ex rel. Johnson v. County Court, 41 Wis 2d 188, 192, 163 N.W. 2d 6 (1968); 9 Callaghan's Wisconsin Pleading and Practice secs. 85.06, 85.07 (1979). A court by writ of mandamus may compel an inferior court to vacate orders in the making of which it refused to perform a plain duty by denying parties their absolute statutory rights. State ex rel. Fourth National Bank of Philadelphia v. Johnson, 103 Wis. 591, 79 N.W. 1081 (1899). Petitioner contends mandamus lies in this case because the panel has denied her her right to a

hearing, while defendants maintain the panel was authorized to dismiss her claim and therefore the writ should be quashed.

As illustrated by the parties' arguments in this action, it is not clear on the face of the statute whether Chapter 655 authorizes a formal panel to dismiss when a claimant refuses to comply with its order or whether petitioner has a clear legal right to a hearing on the merits. Ambiguity in a statute, however, does not prevent mandamus if judicial construction and statutory interpretation may be used to determine whether a mandatory duty exists under the facts. Morrissettee v. DeZonia, 63 Wis. 2d 429, 432-33, 217 N.W. 2d 377 (1974). Therefore the Court must examine the provisions of Chapter 655 to determine the authority of a formal panel and the rights of the petitioner in this matter.

Chapter 655 of the Wisconsin Statutes was enacted in 1975 to establish an exclusive procedure for the prosecution of

medical malpractice claims against health care providers. All claims must be heard by patient compensation panels which must render a decision on negligence, causation and damages before a court action may be commenced. State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 499-500, 261 N.W. 2d 434 (1977) (holding Chapter 655 to be constitutionally valid). The provisions of Chapter 655 which the parties and the Court find relevant to the issues of a formal panel's power to dismiss and petitioner's right to a hearing are:

> 655.003 Rule-making authority. The administrator, department and commissioner may promulgate such rules under ch. 227 as are necessary to enable them to perform their responsibilities under this chapter.
>
> 655.04 Patients' claims.
> (1)(b) The administrator shall assign the controversy to the appropriate panel as determined under sub. (2). No action may be commenced in court unless the controversy has first been heard and findings and an order have been made by the panel.
> (6) STATUTE OF LIMITATIONS. The filing of the submission of controversy shall toll any applicable statute of limitations, and such statute of limitations shall remain

tolled until 30 days after the hearing panel issues its written decision, or the jurisdiction of the panel is otherwise terminated.

655.16 Findings, orders and awards. (1) All parties shall be afforded opportunity for public hearing after reasonable notice, but disposition of a controversy may be made by compromise, stipulation, agreement or default without hearing.

655.17 Formal panel; hearing. (1) Except as otherwise provided in this chapter, a formal panel shall be bound by the law applicable to civil actions, but shall conduct such hearings and make such investigations in reference to questions at issue before it as in its judgment are best adapted to ascertain and determine the substantial rights of the parties expeditiously and accurately and to carry out justly the spirit of this chapter.

(2) Each formal panel may prescribe the procedures necessary to implement this chapter, order physical examinations under sub. (3), subpoena witnesses, administer oaths, apply to any circuit court having requisite jurisdiction to enforce the attendance and testimony of witnesses and the production and examination of books, papers and records and exercise all other powers and duties conferred upon it by law.

(3) Upon the application of any party or upon its own motion, a formal panel may appoint a disinterested and duly qualified physician or other professional person or expert to make any necessary professional or expert examination of a claimant or relevant evidentiary matter and to report or

testify as a witness in respect thereto.

Wis. Stat. secs. 655.003, 655.04(1),(6), 655.16(1), 655.17(1)-(3) (1977) (emphasis added).

An administrative agency or board created by the legislature has only those powers expressly conferred by statute and those powers which arise by fair implication from the express powers. Such statutes are generally strictly construed and any reasonable doubt regarding the existence of an implied power should be resolved against the exercise of such authority. Brown v. Milwaukee Board of School Directors, 83 Wis. 2d 316, 333, 265 N.W. 2d 559 (1978); State (Department of Administration) v. Department of Industry, Labor and Human Relations, 77 Wis. 2d 125, 136, 252 N.W. 2d 353 (1977); Wisconsin's Environmental Decade, Inc. v. Public Service Comm., 69 Wis. 2d 1, 16, 230 N.W. 2d 243 (1975).

Upon examination of the above-quoted statutes, it is evident that none of them explicitly empower a formal panel to dismiss a claim for refusal to comply with the terms of a panel's order for physical examination. Section 655.003 establishes the authority of the state court administrator, the department of health and social services, and the insurance commissioner to promulgate rules according to the rule-making procedures set forth in Chapter 227 of the Wisconsin Statutes. Section 655.04(1)(b) requires a hearing, findings and an order by the panel before a court action is commenced and thus possibly supports petitioner's position that she is entitle to a hearing. Section 655.04(6), on the other hand, indicates the jurisdiction of a panel can be terminated in ways other than by the issuance of a written decision. Section 655.16(1) also

indicates that disposition of a controversy may be made by default without a hearing. Thus it appears a panel may dispose of a claim in ways other than by hearing, findings and order.

Sections 655.17(2)-(3) explicitly empower a formal panel to order a claiment to submit to a physical examination as was done in this case. The controversy in this case stems from the parties' conflicting views as to the meaning of secs. 655.17(1) & (2).

Defendants contend the panel was authorized to dismiss petitioner's claim pursuant to that portion of sec. 655.71(1) which provides that "(e)xcept as otherwise provided in this chapter, a formal panel shall be bound by the law applicable to civil actions . . . ." Wis. Stat. sec. 655.17(1). An examination of the quoted statutes reveals no stated exceptions regarding the enforcement of orders for physical examinations. Defendants contend "the law applicable to civil actions" includes the rules of civil procedure found in Chapters 801 through 847 of the Wisconsin Statutes. Most importantly, it includes secs. 804.12(2)(a) and 805.03 which provide:

> (2) Failure to comply with order. (a) If a party . . . fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10 (order to submit to physical examination), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> 1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance

with the claim of the party obtaining the order;

2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

805.03 Failure to prosecute or comply with procedure statues.

For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s.

> 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

Wis. Stat. secs. 804.12(2)(a), 805.03 (1977) (emphasis added). The panel, defendants maintain, acted pursuant to secs. 804.12(2)(a)3 and 805.03 in dismissing petitioner's proceeding and thus the panel was expressly authorized to do so.

Petitioner, on the other hand, maintains the pan was obligated to apply to the court pursuant to sec. 885.12 of the Wisconsin Statutes for the enforcement of the order and to have the court punish petitioner, if necessary, for her refusal to obey the panel's order. Petitioner relies on that portion of sec. 655.17(2) which provides that "(e)ach formal panel may . . . apply to any circuit court having requisite jurisdiction to enforce the attendance and testimony of witnesses and the production and examination of books, papers and records . . . ." Wis. Stat.

sec. 655.17(2). The Court agrees with petitioner that this provision most likely refers to sec. 885.12 which provides:

> 885.12 Coercing witnesses before officers and boards
>
> If any person without reasonable excuse, fails to attend as a witness, or to testify as lawfully required before any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee, or other officer or person authorized to take testimony, or to produce a book or paper which he was lawfully directed to bring, or to subscribe his deposition when correctly reduced to writing, any judge of a court of record or court commissioner in the county where the person was obliged to attend may, upon sworn proof of the facts, issue an attachment for him, and unless he shall purge the contempt and go and testify or do such other act as required by law, may commit him to close confinement in the county jail until he shall so testify or do such act, or be discharged according to law. The sheriff of the county shall execute the commitment.

Wis. Stat. sec. 885.12 (1977). Petitioner also correctly asserts that administrative officers have no power to punish contempts committed against them while acting in an administrative capacity and that administrative agencies must apply to the

court according to the procedures set forth in sec. 885.12 to punish contempts which are committed before them. State v. Balistrieri, 55 Wis. 2d 513, 519, 521, 201 N.W. 2d 18, 22-23 (1972); State v. Marcus, 259 Wis. 543, 49 N.W. 2d 447 (1951). Therefore, petitioner argues, the panel was obligated to seek judicial enforcement of its order under sec. 885.12.

Petitioner's argument, however, is based on the premise that the sanction of dismissing an action for failure to comply with an order constitutes punishment for contempt. The Wisconsin Supreme Court recognizes a distinction between punishment for contempt and other remedies which may be applied when a party fails to comply with a pre-trial order. In Hauer v. Christon, 43 Wis. 2d 147, 168 N.W. 2d 81 (1969), the court stated there was a difference between striking a pleading for noncompliance with a pre-trial order as mere punishment for contempt and striking

because a party has failed to produce material evidence in its possession. There is a "presumption of fact as to the bad faith and the untruth of the answer begotten from the suppression or the failure to produce evidence." Id. at 152. Striking a pleading upon a refusal to produce evidence is related to the merits of the case and is only remotely punishment. Dismissal for failure to be ready on a trail date for reasons beyond the control of the defendant, for example, is punishment for contempt because it is not related to the merits of the action. Id. at 152-53.

Similarly in Furrenes v. Ford Motor Co., 79 Wis. 2d 260, 255 N.W. 2d 511 (1977), the court dismissed plaintiff's complaint on the merits for failure to produce material evidence as ordered by the court. The court stated that bad faith or lack of merit is required before the court will resort to the extreme sanction of

dismissal. Plaintiff's failure to produce the evidence undercut the gravamen of the complaint, and the court concluded that dismissal was required by the necessity of the court to maintain orderly processing of cases and the dispatch of justice. Id. at 265, 268. The court in Furrenes was not punishing for contempt because the dismissal was related to the merits of the action.

Administrative agencies cannot punish for contempt. State v. Marcus, 259 Wis. 543, 49 N.W. 2d 447 (1951). But the panel's sanction of dismissing petitioner's claim was not punishment for contempt as is imprisonment under sec. 885.12, but rather a remedy related to the merits of the action such as those listed in sec. 804.12(2)(a)1-3 and discussed supra.

Moreover, punishment for contempt is prohibited as a remedy for a party's failure to submit to a physical examination under both the Wisconsin and Federal Rules

of Civil Procedure, Wis. Stat. 804.12(2)(a)4; Sibbach v. Wilson & Co., 312 U.S. 1, 16, 85 L. Ed. 479, 486 (1941). The panel could not be obligated to seek court enforcement of its order under sec. 885.12 because the court could not punish as contempt petitioner's refusal to submit to a physical examination. Therefore the panel was not authorized to enforce its order through the sec. 885.12 procedures.

Petitioner generally asserts that a formal panel must always apply to a court for the enforcement of its orders. The provision in sec. 655.17(2) that a formal panel may apply to a court to enforce the testimony of witnesses and the production of records is reasonable because only courts can hold contempt proceedings, and because punishment for contempt is the only effective remedy for an uncooperative non-party witness. Other sanctions such as staying or dismissing a proceeding are effective against the parties to an action.

To require patient compensation panels to apply to the courts every time a party disobeyed their orders would inhibit the dispatch of the panels' business and detract from the panels' control over their proceedings. Formal panels must be allowed to conduct their investigations in the manner "best adapted to ascertain and determine the substantial rights of the parties expeditiously and accurately . . . ." Wis. Stat. sec. 655.17(1).

The Court believes the legislature never intended formal panels to apply for court enforcement of all their orders and finds that the statutes the legislature enacted do not require formal panels to do so. The Court finds the panel was empowered to dismiss petitioner's claim for her refusal to comply with the terms of the panels' order for an independent physical examination. Section 655.17 states that formal panels are "bound by the law applicable to civil actions." Section

804.12(2)(a)3, as part of the law applicable to civil actions, expressly authorizes the dismissal of a proceeding under the circumstances present in this action. Section 804.12(2)(a) is reinforced by the provisions of sec. 805.03. This result, taken together with the fact that secs. 655.04(6) and 655.16(1) provide for disposition of a claim other than through a hearing, findings and order, leads to the conclusion that petitioner has no clear legal right to a hearing.

Thus the Court finds that defendants were authorized to dismiss petitioner's claim and that petitioner has no clear legal right to a hearing before the panel due to her refusal to comply with the panel's order for independent physical examination. Therefore, defendants' motion to quash the alternative writ of mandamus must be granted.

The Court directs the defendant's attorney to prepare the necessary order in compliance with the ruling of the Court.

Dated: February 1st, 1980.

BY THE COURT:

WILLIAM D. Byrne
Circuit Judge
Dane County Circuit
Court No. 9

STATE OF WISCONSIN
SUPREME COURT
FORMAL PATIENTS COMPENSATION PANEL

SUZANNE MAZUREK,

Claimant, ORDER

vs.

MONROE CLINIC, DRS. DON G. TRAUL, JOHN E. INMAN, JAMES R. STURMONT, EGBERT KAMSTRA, D.C. RIESE, and ST. CLARE HOSPITAL, and WISCONSIN PATIENTS COMPENSATION FUND,

Respondents. Case No. F2-263

A hearing having been held on July 25, 1979, before Frederick W. Miller, Attorney-Chairman of the Patients Compensation Panel on the motion of the Patients Compensation Panel for the purpose of claimant answering why the above-entitled proceeding should not be dismissed for failure to comply with an order of the Panel dated June 26, 1979, and all parties having been fully heard on said motion;

The Panel makes the following findings:

(1) That respondents in this proceeding have requested that their medical expert be permitted to examine claimant.

(2) That on June 26, 1979, the Panel ordered claimant to submit to a medical examination by respondents' medical expert and that during the medical examination, respondents' medical expert be allowed:

(a) to take a relevant history of the claimant;

(b) to perform what medical tests he deems necessary;

(c) to conduct the examination outside the presence of claimant's attorney.

(3) That claimant did submit to an examination outside the presence of her attorney by respondents' medical expert, but refused to give a relevant medical history and refused to submit to EMG and nerve conduction studies. That in a prior medical examination by claimant's own expert claimant did give a relevant medical

history and submitted to EMG and nerve condition studies.

(4) In a report submitted on July 25, 1979, after the medical examination of claimant as set forth above, respondents' medical expert reported as follows:

> In order to arrive at a proper opinion reflecting my best effort in analysis it is necessary that I be able to review the history for circumstances of onset, prior symptoms, the pattern of the evaluation of symptoms, the changes that have occurred over time and the responses to treatment measures. All of these aspects are relevant to the points of disagreement except for the EMG studies. The only way I could handle that would be to repeat certain tests of nerve conduction and selected EMG muscle testing.
>
> It is generally accepted practice that the history is an important (perhaps the most important) aspect in analysis of neurological disorders.

(5) That respondents' medical expert seeks to conduct an examination of the same scope as that conducted by claimant's medical expert.

(6) That under these circumstances such an examination by respondents' medical expert is reasonable in scope.

(7) That the claimant has refused and still refuses to submit to a medical examination by respondents' medical expert of the same scope as that conducted by claimant's medical expert.

(8) That an independent medical examination, such as involved here, is not an adversary proceeding, but rather preparation and investigation for the hearing before the Panel.

NOW, THEREFORE, IT IS ORDERED that this proceeding be dismissed with prejudice.

Dated this 28th day of August, 1979.

Frederick W. Miller
Attorney-Chairman
Patients Compensation
Panel

Dated this 28th day of August, 1979.

Jeffrey Kravat
Director
Patients Compensation
Panel

SUZANNE MAZUREK,

Claimant,

vs. Case No. F2-263

MONROE CLINIC, DRS. DON G. TRAUL, JOHN E. INMAN, JAMES R. STURMONT, EGBERT KAMSTRA, D.C. RIESE, and ST. CLARE HOSPITAL, and WISCONSIN PATIENTS COMPENSATION FUND,

Respondents.

ORDER

Respondents in this action having moved the panel to establish the scope of the medical examination which may be made by Dr. Peter Eichman, and said motion having come on for hearing before Frederick Miller, Attorney-Chairman of the Panel on June 22, 1979, and both claimant and respondents having been fully heard on said motion.

NOW, THEREFORE IT IS ORDERED that said motion is granted and that during the medical examination, Dr. Peter Eichman be allowed:

(1) to take a relevant history from the claimant;

(2) to perform what medical tests he deems necessary; and

(3) to conduct the examination outside the presence of claimant's attorney.

Dated this 26th day of June, 1979.

Frederick Miller
Attorney-Chairman

Formal Panel; Hearing. WIS. STAT. 655.17(3):

Upon the application of any party or upon its own motion, a formal panel may appoint a disinterested and duly qualified physician or other professional person or expert to make any necessary professional or expert examination of a claimant or relevant evidentiary matter and to report or testify as a witness in respect thereto. Such a witness shall be allowed actual and necessary traveling expenses and a reasonable fee fixed by the administrator, to be collected and paid by the party requesting the witness or by the administrator if the panel makes the request.

Court Trial. WIS. STAT. 655.19

Unless the parties have stipulated in writing under s. 655.07 to be bound by the panel determination, any party to a panel hearing may, within 120 days after the date of an order made by a panel, commence an action for a trial in the circuit or county court for the county designated in the submission of controversy under s. 655.04. The provisions of ch. 270 which are not in conflict with this chapter shall apply to such trial. No panel member may participate in the trial either as counsel or witness. The judgment or order of the circuit or county court shall supersede any order or award made by a panel in a hearing under this chapter.

(1) Formal panels. The findings and order, except for damages awarded, of any formal panel shall be admissible in any action in circuit or county court, and the amount of damages awarded may, at the court's discretion, be admissible in such action. In the case of a trial subsequent to a formal panel hearing, the court may

award actual court costs and reasonable attorney fees in excess of statutory limitation to the prevailing party.

Physical and Mental Examination of Parties; Inspection of Medical Documents. WIS. STAT. 804.10(1):

When the mental or physical condition (including the blood group) of a party is in issue, the court in which the action is pending may order the party to submit to a physical or mental examination. The order may be made on motion for cause shown and upon notice to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

Opposition

81-277

Office-Supreme Court, U.S.
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SEP 10 1981
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SUSAN MAZUREK,
Petitioner,

v.

FREDERICK W. MILLER, Attorney-Chairman, and JEFFREY L. KRAVAT, Director of the Formal Patients Compensation Panel, ST. CLARE HOSPITAL, DR. S.C. RIESE, DR. DON G. TRAUL, DR. JOHN E. INMAN, DR. JAMES R. STURMONT, DR. EGBERT KAMSTRA and MONROE CLINIC,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF WISCONSIN, DISTRICT IV

BRONSON C. LA FOLLETTE
Attorney General
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SUSAN MAZUREK,
Petitioner,

v.

FREDERICK W. MILLER, Attorney-Chairman, and JEFFREY L. KRAVAT, Director of the Formal Patients Compensation Panel, ST. CLARE HOSPITAL, DR. S.C. RIESE, DR. DON G. TRAUL, DR. JOHN E. INMAN, DR. JAMES R. STURMONT, DR. EGBERT KAMSTRA and MONROE CLINIC,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF WISCONSIN, DISTRICT IV

QUESTIONS PRESENTED FOR REVIEW

1. Does the petitioner have constitutional immunity against a medical examination ordered for discovery and evidentiary purposes in medical malpractice proceedings initiated by the petitioner?

2. Was due process of law denied when the Patients Compensation Panel dismissed petitioner's medical malpractice claim because petitioner refused to comply with a discovery order authorized by law and issued after notice and hearing?

SUMMARY OF ARGUMENT

There are no special and important reasons for granting a review on writ of certiorari.

Petitioner has no constitutional immunity against a physical examination ordered for discovery and evidentiary purposes in medical malpractice proceedings initiated by petitioner. This is established by two decisions of this Court wherein this Court upheld the validity of Fed. R. Civ. P. 35.

The petitioner's due process argument is unfounded because the record shows that the petitioner was accorded ample due process.

ARGUMENT

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Fed. R. Civ. P. 17.

The petitioner does not satisfy any of the reasons set forth in Fed. R. Civ. P. 17 as examples of reasons warranting discretionary review of this highest Court.

As her reasons, petitioner asserts constitutional protection against unwanted medical examinations ordered in connection with medical malpractice proceedings initiated by the petitioner, and she claims deprivation of property without due process of law. Both purported reasons are unfounded in law and in fact.

I. The Petitioner Has No Constitutional Immunity Against A Medical Examination Ordered For Discovery And Evidentiary Purposes In Medical Malpractice Proceedings Initiated By The Petitioner.

There is no constitutional immunity against unwanted medical examinations ordered in medical malpractice proceedings such as those conducted under ch. 655, Wis. Stats. This is well established by this Court's decision in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). Both cases involved challenges to Fed. R. Civ. P. 35 and 37. Rule 35 authorizes the court to order a physical examination of a party where the party's physical condition is in controversy. This corresponds with sec. 655.17(3), Wis. Stats. Petition Appendix E. Rule 37 authorizes various sanctions for failure to comply with a discovery order, including dismissal of the proceedings. Fed. R. Civ. P. 37(b)(2)(C). This corresponds with secs. 655.17(1), 804.12(2)(a)3. and 805.03, Wis. Stats., the interpretation of which was at issue in state court.

In *Sibbach*, the principal issue was whether the discovery provisions in Rule 35 were beyond the rule-making authority delegated by Congress to the Court. The decision turned on whether the rule was procedural or whether it amounted to a change in the substantive law recognized in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891). Although divided on this issue, the Court unanimously rejected a constitutional challenge like the one advanced by the petitioner here. As explained by the Court in *Schlagenhauf*, 379 U.S. at 113:

> These same contentions were raised in Sibbach v. Wilson & Co., 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479, by a plaintiff in a negligence action who asserted a physical injury as a basis for recovery. The Court, by a closely divided vote, sustained the Rule as there applied. Both the majority and dissenting opinions, however, agreed that Rule 35 could not be assailed on constitutional grounds. Id., at 11-12, 17, 61 S.Ct., at 425-426, 428.

In the view of Mr. Justice Frankfurter, joined by three other justices, dissenting in *Sibbach*, Rule 35 was contrary to a common law immunity which was recognized in *Botsford*, but he summarily dismissed the notion of any constitutional underpinnings: "To be sure, the immunity that was recognized in the Botsford case has no constitutional sanction. It is amendable to statutory change." *Sibbach*, 312 U.S. at 17.

Thus, contrary to petitioner's assertions, petitioner has no constitutional protection to invoke, and even if the State of Wisconsin were subject to the common law of *Botsford*, the state has substituted specific statutes which authorize medical examinations for discovery and evidentiary purposes in medical malpractice proceedings. Sec. 655.17(3), Wis. Stats.

Finally, petitioner's notion of constitutional immunity is especially weak given that she not only refused to submit to physical tests. She also refused to give her medical history, even though she had given her medical history to her own physician and medical history is essential to an analysis of neurological disorders. Petition Appendix D at 2-3.

II. Dismissal Of Petitioner's Medical Malpractice Claim Due To Her Refusal To Comply With The Discovery Order Did Not Constitute Denial Of Due Process Because The Discovery Order And The Dismissal Order Were Authorized By Law And Both Were Preceded By Notice And Hearing.

Petitioner's deprivation of property without due process argument is unfounded. In the underlying proceedings before the Patients Compensation Panel, the respondents filed a motion to establish the scope of the medical examination to be conducted by Dr. Peter Eichman. A hearing was conducted, the petitioner was heard and an order dated June 26, 1979, and defining the scope of discovery was issued, as follows:

> NOW, THEREFORE IT IS ORDERED that said motion is granted and that during the medical examination, Dr. Peter Eichman be allowed:
>
> (1) to take a relevant history from the claimant;
>
> (2) to perform what medical tests he deems necessary; and
>
> (3) to conduct the examination outside the presence of claimant's attorney.

Petition Appendix D at 5-6.

The petitioner complied in part but refused to give relevant medical history and refused to submit to EMG and nerve conduction studies. Petition Appendix D at 2-3.

On July 11, 1979, the panel issued to the petitioner an order to show cause why the proceedings should not be dismissed due to her failure to comply with the order. A hearing was held on July 25, 1979. On August 29, 1979, the panel issued findings and ordered the proceedings dismissed because petitioner continued to refuse to comply with the discovery order. Petition Appendix D.

The petitioner was accorded ample due process. She was given notice and hearing before the discovery order was granted and also before her proceedings were dismissed. It appears that even at the latter hearing she was given an opportunity to comply, but she steadfastly refused.

The petitioner seems to try to attack the propriety of the initial discovery order on the ground that sec. 655.17(3), Wis. Stats., does not provide adequate standards for issuing such orders. This is clearly erroneous. The statute authorizes only "*necessary* professional or expert examination." This standard is at least as demanding as the "good cause" standard contained in Rule 35 and sec. 804.10, Wis. Stats.

There is no record of the hearings before the panel so we do not know what was argued there, but we know that the petitioner did not challenge the necessity for or reasonableness of the discovery order in the trial court or in the state court of appeals. What record there is indicates strongly that the scope of the order was necessary and reasonable because the disputed EMG and nerve conduction studies had been performed by the petitioner's own physician. Petition Appendix D at 2. Petitioner's physician had also obtained relevant medical history, and Dr. Eichman stated that medical history is perhaps the most important aspect in analysis of neurological disorders. Petition Appendix D at 2-3.

Petitioner's claim that she could not obtain judicial review of the panel's discovery order or dismissal order are preposterous. By way of her petition for writ of mandamus, the petitioner has had judicial review in the Circuit Court for Dane County and the State of Wisconsin Court of Appeals, District IV. The Wisconsin Supreme Court declined to grant a petition for review. Petition Appendix A.

Even at the time the discovery order was issued, the petitioner could have sought judicial review in circuit court by way of a writ of certiorari or a writ of prohibition. *State ex rel. Hippler v. Baraboo,* 47 Wis. 2d 603, 609-11, 178 N.W.2d 1 (1970); *State ex rel. Jefferson v. Roraff,* 44 Wis. 2d 250, 255-58, 170 N.W.2d 691 (1969). Petitioner attempted neither so she cannot say they were denied her.

Moreover, the petitioner's attack on the discovery order is not properly before this court just as it was not properly before the state court of appeals. The court of appeals held that arguments relating to the propriety of the discovery order were not raised before the trial court and thus would not be considered for the first time on appeal. *Mazurek v. Miller,* 100 Wis. 2d 426, 434-35, 303 N.W.2d 122, 127 (1981). This court should likewise decline to consider issue not decided by the state courts.

CONCLUSION

The reasons advanced by petitioner in support of her petition for a writ of certiorari are legally and factually unfounded and certainly do not justify review by this highest Court. It is respectfully submitted that the petition ought to be denied.

Dated:

BRONSON C. LA FOLLETTE
Attorney General
Attorney of Record

ROBERT W. LARSEN
Assistant Attorney General

Attorneys for Respondents, Frederick W. Miller and Jeffrey L. Kravat

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Opposition

2

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SUSAN MAZUREK,
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FREDERICK W. MILLER, Attorney-Chairman, and JEFFREY L. KRAVAT, Director of the Formal Patients Compensation Panel, ST. CLARE HOSPITAL, DR. S.C. RIESE, DR. DON G. TRAUL, DR. JOHN E. INMAN, DR. JAMES R. STURMONT, DR. EGBERT KAMSTRA and MONROE CLINIC,
Respondents.

On Petition For A Writ
of Certiorari To The
Supreme Court of Wisconsin

BRIEF IN OPPOSITION BY RESPONDENTS ST. CLARE HOSPITAL AND DR. S.C. RIESE

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No. 81-277

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SUSAN MAZUREK,
Petitioner,

v.

FREDERICK W. MILLER, Attorney-Chairman, and JEFFREY L. KRAVAT, Director of the Formal Patients Compensation Panel, ST. CLARE HOSPITAL, DR. S.C. RIESE, DR. DON G. TRAUL, DR. JOHN E. INMAN, DR. JAMES R. STURMONT, DR. EGBERT KAMSTRA and MONROE CLINIC,
Respondents.

On Petition For A Writ
of Certiorari To The
Supreme Court of Wisconsin

BRIEF IN OPPOSITION BY RESPONDENTS ST. CLARE HOSPITAL AND DR. S.C. RIESE

Respondents St. Clare Hospital and Dr. S.C. Riese respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decisions of the Wisconsin Supreme Court and the Wisconsin Court of Appeals. Those decisions are reported at 100 Wis.2d 426, 303 N.W.2d 122 (Ct. App. 1981), pet. for rev. denied, ___ Wis.2d ___ , ___N.W.2d ___ (1981).

QUESTIONS PRESENTED

Whether it is a denial of due process for plaintiff's action, based upon alleged medical malpractice, to be dismissed when plaintiff repeatedly refused to comply with an order, properly entered, that she must submit to an independent medical examination of the same scope and type performed by her own medical expert for purposes of trial.

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STATEMENT OF THE CASE

On September 6, 1978, petitioner filed a submission of controversy under Chapter 655 of the Wisconsin Statutes alleging malpractice on the part of respondent health care providers. The case was set for hearing before a formal panel of five members. (Resp. App. 101)

During discovery, the health care provider respondents requested that petitioner submit to an independent medical examination by Dr. Peter Eichman, a neurologist. Petitioner's counsel refused to allow such examination unless he was present or unless petitioner would not be asked to give Dr. Eichman a medical history and would not be subject to certain types of testing. In response, the respondent health care providers moved the panel for an Order to compel an examination without such restrictions. (Resp. App. 101, 102)

On June 22, 1979, respondent Frederick Miller, attorney-chairman of the formal panel, presided at a hearing on the motion of respondent health care providers to require petitioner to submit to an independent medical examination by Dr. Peter Eichman. The attorney-chairman ruled that the examination should take place and that Dr. Eichman should be allowed to take a relevant history from petitioner, to perform medical tests that he deemed necessary and to conduct the examination outside the presence of petitioner's attorneys. This ruling was set forth in an order dated June 26, 1979. (Resp. App. 102, 104, 105)

On June 26, 1979, petitioner appeared for the medical examination, but in direct contradiction to the ruling of the attorney chairman and upon the advice of counsel, she refused to give a relevant medical history and refused to submit to medical tests, all of which her own medical expert had been allowed to take. (Resp. App. 102)

On July 11, 1979, the panel issued an order commanding petitioner to appear on July 25, 1979, to show cause why her claim should not be dismissed for failure to comply with the June 26 order. Her attorney appeared at the hearing, argued that the panel had no authority to dismiss the action, and further advised the panel that petitioner still would not comply with the terms of the June 26, 1979 order. No constitutional objections were raised at this hearing. (Resp. App. 102, 103, 105, 106)

At this hearing, Dr. Eichman's report was submitted to the panel. That report stated:

> I examined Suzanne Mazurek on June 26, 1979. She advised me that she could not answer any questions regarding her medical case. She was cooperative in permitting me to examine her in a neurological sense.
>
> In this case, there is disagreement among experts on the location of the lesion, the principal factors precipitating the disorder and the long term prognosis. There is little emphasis on treatment approaches in some of the reports. There is a disagreement on Electromyographic and nerve conduction data and interpretation.
>
> In order to arrive at a proper opinion reflecting my best effort in analysis it is necessary that I be able to review the history for circumstances of onset, prior symptoms, the pattern of the evaluation of symptoms, the changes that have occurred over time and the responses to treatment measures. All of these aspects are relevant to the points of disagreement except for the EMG studies. The only way I could handle that would be to repeat certain tests of nerve conduction and selected EMG muscle testing.

> It is generally accepted practice that the history is an important (perhaps the most important) aspect in analysis of neurological disorders.
>
> (Resp. App. 106, 107)

At the conclusion of the July 25 hearing, the panel specifically found that Dr. Eichman sought to conduct an examination of the same scope as that conducted by petitioner's medical expert. Therefore, the panel concluded that Dr. Eichman's proposed examination was reasonable in scope. The panel further found that petitioner had refused and still refused to submit to such an examination. Based upon the continuing refusal of petitioner to submit to a complete medical examination by Dr. Eichman, the panel dismissed the action with prejudice. (Resp. App. 108, 109, 110)

By writ of mandamus, petitioner sought to have the Circuit Court for Dane County, Wisconsin order the formal panel to give her a hearing on the merits of her case despite her refusal to submit to an independent medical examination. The basis for such writ of mandamus was that the panel lacked the power to dismiss her action for any reason without a hearing on the merits and that the panel specifically lacked the power to dismiss the action for her failure to submit to the medical examination as ordered. No constitutional arguments were raised in the petition for writ of mandamus. No constitutional arguments were raised at the hearing on the petition for writ of mandamus. (Resp. App. 111-115).

In a ruling dated February 1, 1980, the Circuit Court held that respondent's motions to quash the writ would be granted. By motion to reconsider, petition raised the constitutional issue of denial of due process for the first time in the entire proceeding. The court by order dated May 6, denied the motion to reconsider.

Petitioner then appealed the Circuit Court's decision to quash the writ and the Circuit Court's decision denying the motion to reconsider to the Wisconsin Court of Appeals. In that appeal petitioner's original brief was struck from the court file for inserting alleged facts which were not in the record and for basing arguments on said non record alleged facts. An amended brief was then filed. In spite of the fact that petitioner's due process arguments were never raised until its motion to reconsider before the State Circuit Court, the Court of Appeals dealt with the merits of petitioner's due process arguments as follows:

> Appellant contends that her due process interest in liberty and her right to privacy were violated by an order requiring her to undergo invasive medical testing. In support of this claim, she cites *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250 (1891). In *Botsford,* the Court held that absent express legislative authority, a federal district court had no power to order a plaintiff to submit to a medical examination. In so holding the Court stated: 'No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' *Botsford,* 141 U.S at 251.
>
> In *Sibbach v. Wilson & Co.,* 312 U.S. 1 (1941), the Court made clear that *Botsford* merely held that there was no procedural authority for an order requiring a medical examination. The subsequent enactment of Fed. R. Civ. P. 35 granted Federal courts that authority. In upholding Fed. R. Civ. P. 35 against a constitutional attack similar to that

made by appellant, the Court stated: 'The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that, as we hold, no invasion of freedom from personal restraint attaches to refusal to comply with its provisions.' *Sibbach*, 312 U.S. at 14. Invasion of privacy was again rejected as an attack on Fed. R. Civ. P. 35 in *Schlagenhauf v. Holder*, 379 U.S. 104, 113 (1964). We conclude that there is no constitutional difficulty under the facts of this case with requiring a person seeking compensation for injuries to undergo an independent medical examination for the benefit of the adverse parties.

Appellant contends that due process at least requires that her claim not be dismissed unless she is provided with a hearing before a court. Appellant cites no authority for the proposition that due process requires her to have a hearing before a court rather than a hearing before the panel when the panel's decision can be reviewed by a court. 'Due process is flexible and requires only such procedural protections as the particular situation demands.' *Strykowski*, 81 Wis.2d at 512, 261 N.W.2d at 444. Appellant is entitled to a judicial review of the determination of the panel. *Strykowski*, 81 Wis.2d at 520-21, 261 N.W.2d at 448. Due process is satisfied 'if the statutory procedures provide an opportunity to be heard in court at a meaningful time and in a meaningful manner.' *Strykowski*, 81 Wis.2d at 512, 261 N.W.2d at 444. The availability of judicial review satisfies the requirements of due process.

> Appellant contends that it was a violation of due process to delegate to the panel the power to dismiss a claim without a hearing on the merits. The delegation of judicial authority to the panels was upheld in *Strykowski*, 81 Wis.2d at 520-22, 261 N.W.2d at 448-49. The court there held that *quasi*-judicial authority may constitutionally be delegated to an administrative body. *Strykowski*, 81 Wis.2d at 521, 261 N.W.2d at 448. The availability of judicial review satisfies any due process problems which this delegation might otherwise entail.

The Court of Appeals on all issues, including the constitutional issues, affirmed the Circuit Court.

Petition for review was filed by petitioner with the Wisconsin Supreme Court and this was denied. Petitioner has now filed a petition for writ of certiorari before the United States Supreme Court.

As a final note, respondents feel compelled to point out some inaccuracies in petitioner's statement of the case. At page 13 of her petition, petitioner states:

> Mazurek did submit to an examination by respondents' expert witness but refused to undergo electromyograph and nerve conduction tests demanded by the expert witness.

This is an inaccurate statement in that petitioner also refused to give a relevant medical history to the physician.

Also at Page 13 of the petition, petitioner states that she objected to the June 26 Order on the grounds that her right to privacy would be violated. This is not the case and the record does not support such an assertion.

SUMMARY OF ARGUMENT

Petitioner makes two arguments for granting her petition. Neither are soundly based. First, petitioner argues that Sec. 655.17, Wis. Stats. is unconstitutional. This contention has never been made in this case until now and should be rejected for that reason alone. Moreover, there is no basis for the contention. In this case Sec. 655.17 was interpreted the same as Sec. 804.10, Wis. Stats. and Rule 35 of the Federal Rules of Civil Procedure, and the Constitutionality of both is well established. Secondly, petitioner contends that she has an absolute right to have the merits of her case heard even though she will not submit to an independent medical examination. As a matter of constitutional law this same contention has been rejected by this court on at least two different occasions, and petitioner presents no reasons why those cases should be reconsidered.

REASONS WHY THE WRIT SHOULD BE DENIED

In Wisconsin a patient who seeks to make a claim against a physician, a hospital or certain other health care providers, must first have the matter reviewed by a Patient's Compensation Panel. After a hearing on the merits before a Panel, any party may file an action in State Court for trial de novo. Chapter 655, Wis. Stats.; *State ex rel. Strykowski v. Wilke,* 81 Wis.2d 491, 261 N.W.2d 434 (1978).

Chapter 655, which governs actions before a Panel, specifically provides:

> (1) Except as otherwise provided in this chapter, a formal panel shall be bound by the law applicable to civil actions, but shall conduct such hearings and make such

investigations in reference to questions at issue before it as in its judgment are best adapted to ascertain and determine the substantial rights of the parties expeditiously and accurately and to carry out justly the spirit of this chapter.

(3) Upon the application of any party or upon its own motion, a formal panel may appoint a disinterested and duly qualified physician or other professional person or expert to make any necessary professional or expert examination of a claimant or relevant evidentiary matter and to report or testify as a witness in respect thereto.

Section 655.17(1) and (3).

Section 804.12(2)(a)3, Wis. Stats., which is part of the Wisconsin Rules of Civil Procedure, provides:

(2) FAILURE TO COMPLY WITH ORDER. (a) If a party or an officer, director, or managing agent of a party or a person designated under §804.05(2)(e) or 804.06(1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or §804.10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * * *

3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Thus, it is indisputably clear that the panel statutorily had the same authority under these circumstances as a Wisconsin State Court. This included the authority to order an independent medical examination and the authority to dismiss a case if a discovery order was disobeyed. The Wisconsin Court of Appeals explained.

> The panels are granted authority to dismiss a claim by virtue of sec. 655, 17(1), Stats., which provides in part: 'Except as otherwise provided in this chapter, a formal panel shall be bound by the law applicable to civil actions ...' The rules of discovery applicable to civil actions include the sanctions contained in sec. 804.12(2)(a)3, Stats. ...
>
> * * * *
>
> Appellant argues that sec. 804.12(2)(a)3, Stats., grants the dismissal power only to a court, and that the panel was required to obtain a court order of dismissal rather than itself dismissing the claim. Section 655.17(1), Stats., however, applies the rules of civil procedure to panel proceedings. The panel acts as a 'quasi-judicial' body. *Strykowski,* 81 Wis.2d at 521-22, 261 N.W.2d at 448-49. The powers of a court under sec. 804.12(2) are granted to a panel by virtue of sec. 655.17(1), unless provided otherwise in Ch. 655.
>
> Appellant contends that sec. 655.17(2), Stats., requires the panel to obtain a court order to dismiss a claim. ...
>
> * * * *
>
> This section requires an application to circuit court only when the panel seeks to

> enforce the attendance of witnesses and the production of documents. It does not limit the power of the panel to dismiss a claim because of the claimant's failure to comply with the discovery provisions of sec. 655.17(3).

Therefore, the Wisconsin Court of Appeals has clearly interpreted Chapter 655 as giving a formal panel the same authority to control discovery as a court has under the Rules of Civil Procedure.

I. Neither The Decision Below Nor The Record Concerns The Issue Which Is Presented In The Petition.

The record is clear that petitioner never challenged the constitutionality of the panel's actions while she was before the panel. Neither did petitioner challenge the constitutionality of the panel's action in its Petition for Writ of Mandamus in the State Circuit Court. The first time any constitutional issue was raised was when petitioner moved the Circuit Court to reconsider its decision. In that motion petitioner stated:

> Said ruling [the circuit court ruling] has the effect of depriving the plaintiff of a substantial property right without due process of law contrary to the U.S. and Wisconsin Constitutions.

It was not until the case reached the Wisconsin Court of Appeals that petitioner's due process argument actually surfaced. First, she argued that invasive testing violated due process interest in liberty and her right to privacy. Second, she argued that due process at least requires her claim be heard before a court, no matter what her conduct before the panel had

been. Third, she argued that it was a denial of due process to delegate the power to dismiss a case to the panel. The Court of Appeals rejected all these arguments, and petitioner does not raise them in her petition to this Court.

For the first time in this entire case Petitioner has now attacked the constitutionality of §655.17(3), Wis. Stats. In Section I of her argument, petitioner contends that she has a constitutional right to control her own body. She admits that this right is subject to reasonable regulation and exists in harmony with countervailing rights. However, she states that an order by the panel under §655.17(3) for an independent medical examination, must be invalid because there is no requirement in the statute for good cause and no requirement that the scope of the examination be specified. Petitioner argues that §655.17(3) is unconstitutional on its face, and thereby any order pursuant to that section is invalid because it does not have such safeguards as appear in Rule 35 of the Federal Rules of Civil Procedure and §804.10 Wis. Stats., which is the Wisconsin equivalent of Rule 35.

This argument is being made for the first time ever in this petition. The Wisconsin Circuit Court, the Wisconsin Court of Appeals and the Wisconsin Supreme Court were never presented with this contention. This alone should be sufficient reason for denying the petition for writ of certiorari.

More importantly, in making her argument, petitioner totally ignores the facts which are present in this case. Section 655.17(3), as interpreted by the Circuit Court and the Court of Appeals in this case, is no different than §804.10, Wis. Stats., which governs independent medical examinations ordered by a court. Up until this point, petitioner has maintained that there was no issue as to the reasonableness or necessity of the order for an independent medical

examination. Petitioner's only contention was that the panel lacked the power or authority to dismiss the case for whatever reason. Petitioner has always contended that the statutory interpretation issues and the constitutional issues were based solely upon this factual setting. That is, did the statutory scheme provide the authority to the panel to dismiss the action under such circumstances, and if it did, were her due process rights thereby abridged.

In the hearing before the Circuit Court, counsel for petitioner stated:

> MR. ROSENBERG: Your Honor, I don't like to interrupt but I have to object to this line of argument since the issue is not before the Court as to whether the panel attorney correctly ruled in this case. The only issue is whether he has any authority, no matter what she did. So the background of his ruling is not really an issue before the Court, and I don't think it makes any difference what she did or didn't do. It's whether or not the panel can dismiss the case, regardless of what she did.
>
> (Resp. App. 114, 115)

Counsel also stated that petitioner was instructed not to give a medical history to Dr. Eichman because she might make an inconsistent statement that would be detrimental to her.

Thus even were the Court to examine the facts of this case which supported the Order for an independent medical exam, there would be ample basis for supporting the Order of the panel. In this case the petitioner retained an expert for purposes of litigation and submitted to an examination by that expert wherein she allowed him to take whatever tests he felt were necessary and she cooperated by giving him a complete medical history. Respondents sought to have

a similar examination by a physician, a neurologist, who they chose. Despite the fact that petitioner had retained an expert to perform exactly the same type of physical examination and was planning to use that expert at the hearing of the case, she denied respondents the opportunity to have their physician conduct his own physical examination. Under such circumstances it is inconceivable that such an examination was not appropriately ordered by the panel. Under Wisconsin Civil Procedure such examinations are routinely ordered when a claimant has placed her well-being in issue and has had an examination by her own expert for the purpose of trial.

At Page 21 of the petition, petitioner further argues that the Court of Appeals' decision in this case rejected petitioner's argument on the basis that petitioner had waived her right to object because she put her condition in issue upon filing of the claim. The Court of Appeals did no such thing. In fact, the Court of Appeals relied upon the United States Supreme Court cases of *Sibbach v. Wilson and Co.*, 312 U.S. 1 (1941) and *Schlagenhauf v. Holder,* 379 U.S. 104 (1964) in rejecting petitioner's argument. Far from being inconsistent with decisions of the United States Supreme Court, the Wisconsin Court of Appeals relied solely on the decisions of the United States Supreme Court in rejecting petitioner's claims. There is absolutely nothing inconsistent with the Court of Appeals' decision and those of the United States Supreme Court or the Wisconsin Supreme Court.

II. Petitioner's Case Is Essentially One Attacking The Interpretation Given To Chapter 655, Wis. Stats.

Petitioner's argument is basically that she has an incontrovertible right to have a claim of medical malpractice determined on the merits by a court in the State of Wisconsin. She has consistently lost her argument that Chapter 655 and the discovery provisions incorporated therein should be so interpreted. Therefore, petitioner now claims that she has a constitutional right to a hearing on the merits of her claim and the failure to give her such a hearing, no matter what the reason may be, is a denial of due process. There is simply no basis in law for such a claim.

There is nothing singular or unique about this case because it is before a Patient Compensation Panel. This case could just as easily have been before a Circuit Court in the State of Wisconsin. The overriding issue is must a plaintiff submit to a medical examination that she concedes is reasonable and necessary under the circumstances. Here she refused to do so without ever attacking the reasonableness of the order. Her only attack was that the panel has no authority under state law to dismiss her case. The State Court of Appeals held there was statutory authority and that authority was the same as it was for state courts. It rightly concluded that the petitioner's right to a trial in court is not absolute but is dependent upon her following the appropriate procedures and Orders of the tribunal, whether it be a Patients Compensation Panel or a Circuit Court.

It is ironic that petitioner should attempt to claim a constitutional deprivation, since her rights were never in jeopardy. However, had petitioner succeeded in forcing this action to trial without the respondents

being given the opportunity to prepare a defense, it is the respondents who would have been denied the fundamental right to defend themselves.

CONCLUSION

For the above-stated reasons respondents St. Clare Hospital and Dr. S.C. Reise respectfully request that the petition for a writ of certiorari be denied.

Dated this ____ day of _____ , 1981.

Respectfully submitted,

Eugene O. Gehl
Curtis C. Swanson
BRYNELSON, HERRICK,
GEHL & BUCAIDA
122 West Washington Avenue
Madison, Wisconsin 53701
(608) 257-5661

APPENDIX

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT

Susan Mazurek,
Petitioner,

vs.

Frederick W. Miller,
Attorney-Chairman, and
Jeffrey L. Kravat,
Director of the Patients
Compensation Panel,
Defendants.

PETITION FOR ALTERNATIVE
WRIT OF MANDAMUS

The Petition of Susan Mazurek, by her attorney, Richard E. Rosenberg, respectfully shows:

1. On or about 9/6/78, petitioner filed a Submission of Controversy against certain defendants under Chapter 655, Wis. Stats., and requested hearing by a formal panel.

2. Pre-hearings were conducted and discovery proceeded in the action. Counsel for the medical care providers took the deposition of the petitioner by agreement and also the deposition of Dr. Harold Klawans, treating medical expert of the petitioner.

3. Counsel for the medical care providers then expressed their desire to have the petitioner medically examined by Dr. Peter Eichman, neurologist with University of Wisconsin Hospitals in Madison.

4. Barry Goldberg, principal counsel for petitioner, of Chicago, Illinois, consented to such examination provided that petitioner's counsel could be present. In the alternative, Mr. Goldberg agreed the testing could be conducted in the absence of the

attorney provided the examining physician was not permitted to obtain a medical history from the patient that could be introduced or used at the trial of the case and that no "invasive" testing be done such as EMG or nerve conduction studies.

5. After hearing, the defendants in this proceeding, namely, Jeffrey Kravat and Frederick Miller, on June 26, 1979, issued an order for the medical examination. A copy of the order is attached hereto.

6. Upon receipt of the order, Attorney Goldberg notified the defendants that he would not permit his client, Susan Mazurek, to give a medical history to the examining physician or to submit her body to "whatever medical tests he deems necessary" without a stipulation that the history could not be used during the course of the trial.

7. Susan Mazurek was examined by Dr. Peter Eichman on June 26, 1979. On information and belief, no medical history was given by her to Dr. Eichman nor were nerve conduction or EMG tests conducted.

8. On July 11, 1979, the defendant, Frederick Miller, issued an order (to show cause) to Attorneys Richard Rosenberg and Barry Goldberg to appear before him on July 25, 1979, at 1:30 o'clock p.m. Said order was delivered by Certified Mail and received on July 13th and a copy is attached hereto.

9. Your affiant appeared at the hearing on July 25th at which time and place he was presented with a copy of Dr. Eichman's letter of July 25th, a copy of which is also attached hereto.

10. At said hearing this affiant pointed out to the defendants, Mr. Kravat and Mr. Miller, they had no authority to dismiss the action as threatened without applying for and obtaining an order from a judge of a

court of record pursuant to Wis. Stats. 855.12 as required by that section and by case law in *State v. Balistrieri*, 55 Wis. 2d 513, 201 NW 2d 18.

11. This affiant further pointed out to the defendants that Peter Eichman had access to the medical history of the petitioner both through her deposition and the deposition of her treating physician, Dr. Harold Klawans, and also had access to EMG studies and nerve conduction studies as set forth in Dr. Klawans deposition and records. Furthermore, that Dr. Eichman would not be entitled to a medical history from the petitioner in the absence of her attorney as it constituted an invasion of her right to be represented by counsel in this action.

12. After hearing arguments of all parties, the defendant, Frederick Miller, upon being advised that his orders with respect to the medical examination would not be complied with by the petitioner on advice of her counsel, indicated that he would sign an order dismissing the action on the grounds that he had inherent authority to not only issue the order but to impose sanctions for its violation under 655.17, Wis. Stats.

13. A copy of the order executed by the defendant, Frederick Miller, dated August 28, 1979 is attached hereto.

14. The petitioner, by her counsel, hereby requests the Circuit Court to issue an alternative Writ of Mandamus against the named defendants with copies to counsel for the medical care providers in the principal action requiring the defendants to answer and show cause why Mandamus should not issue compelling the defendants:

a) to vacate the order dismissing the action;

b) to take no further steps to enforce the order of June 26, 1979;

c) To schedule the principal action for a hearing before a formal panel as speedily as possible.

/s/ Richard E. Rosenberg
Richard E. Rosenberg

Subscribed and sworn to before me
this *30* day of *August*, 1979.

/s/ Patricia A. Henry
Notary Public, State of Wisconsin
My Commission: *expires 2-17-80*

STATE OF WISCONSIN
SUPREME COURT
FORMAL PATIENT COMPENSATION PANEL

SUZANNE MAZUREK,
Claimant,

vs. Case No. 52-263

MONROE CLINIC, DRS. DON G. TRAUL, JOHN E. INMAN, JAMES R. STURMONT, EGBERT KAMSTRA, D.C. RIESE, and ST. CLARE HOSPITAL, and WISCONSIN PATIENTS COMPENSATION FUND,
Respondents.

ORDER

Respondents in this action having moved the panel to establish the scope of the medical examination which may be made by Dr. Peter Eichman, and said motion having come on for hearing before Frederick Miller, Attorney-Chairman of the Panel on June 22, 1979, and both claimant and respondents having been fully heard on said motion.

NOW, THEREFORE IT IS ORDERED that said motion is granted and that during the medical examination, Dr. Peter Eichman be allowed:

(1) to take a relevant history from the claimant;

(2) to perform what medical tests he deems necessary; and

(3) to conduct the examination outside the presence of claimant's attorney.

Dated this *26th* day of June, 1979.

/s/ Frederick Miller
Frederick Miller
Attorney-Chairman

STATE OF WISCONSIN
SUPREME COURT
FORMAL PATIENTS COMPENSATION PANEL

SUSAN MAZUREK,
Claimant,

ORDER

vs.

Case No. 52-263

MONROE CLINIC, DRS. DON G. TRAUL, JOHN E. INMAN, JAMES R. STURMONT, EGBERT KAMSTRA, D.C. RIESE, and ST. CLARE HOSPITAL, and WISCONSIN PATIENTS COMPENSATION FUND,
Respondents.

STATE OF WISCONSIN TO SUSAN MAZUREK AND ATTORNEYS RICHARD E. ROSENBERG AND BARRY GOLDBERG,

Upon the Order on file herein dated the 26th day of June, 1979 and upon the motion of the Patients Compensation Panel for the Madison Region, resulting from claimant's failure to honor and comply with said Order,

YOU ARE HEREBY COMMANDED TO BE AND APPEAR PERSONALLY OR BY YOUR REPRESENTATIVES BEFORE THE HONORABLE FREDERICK W. MILLER, Attorney-Chairman for the Madison Regional Patients Compensation Panel, at the State Capitol, Room 321NE in the City of Madison, Wisconsin on the 25th day of July, 1979 at 1:30 o'clock in the afternoon, to answer:

Why the above-listed matter, now pending before the Patients Compensation Panels, brought under Wisconsin Statute 655.04 (1) (b) should not be dismissed for failure to comply with the said Order of the 26th day of June, 1979.

Dated at Madison, Wisconsin, this 11th day of July, 1979.

/s/ Frederick W. Miller
Frederick W. Miller
Attorney-Chairman
Patients Compensation Panel

25 July 1979

Re: Suzanne Mazurek
#855373

Mr. Robert R. Studt
JENSWOLD, STUDT, HANSON,
CLARK & KAUFMAN
Attorneys at Law
Suite 900
16 North Carroll Street
Madison, WI 53703

I examined Suzanne Mazurek on June 26, 1979. She advised me that she could not answer any questions regarding her medical case. She was

cooperative in permitting me to examine her in a neurological sense.

In this case, there is disagreement among experts on the location of the lesion, the principal factors precipitating the disorder and the long term prognosis. There is little emphasis on treatment approaches in some of the reports. There is a disagreement on Electromyographic and nerve conduction data and interpretation.

In order to arrive at a proper opinion reflecting my best effort in analysis it is necessary that I be able to review the history for circumstances of onset, prior symptoms, the pattern of the evaluation of symptoms, the changes that have occurred over time and the responses to treatment measures. All of these aspects are relevant to the points of disagreement except for the EMG studies. The only way I could handle that would be to repeat certain tests of nerve conduction and selected EMG muscle testing.

It is generally accepted practice that the history is an important (perhaps the most important) aspect in analysis of neurological disorders.

Sincerely,

/s/ Peter Eichman
Peter L. Eichman, M.D.
Professor
Departments of Neurology and Medicine

PLE/csb

STATE OF WISCONSIN
SUPREME COURT
FORMAL PATIENTS COMPENSATION PANEL

SUZANNE MAZUREK,
Claimant, ORDER

vs.

MONROE CLINIC, DRS. DON G. TRAUL, JOHN E. INMAN, JAMES R. STURMONT, EGBERT KAMSTRA, D.C. RIESE, and ST. CLARE HOSPITAL, and WISCONSIN PATIENTS COMPENSATION FUND,
Respondents. Case No. 52-263

A hearing having been held on July 25, 1979, before Frederick W. Miller, Attorney-Chairman of the Patients Compensation Panel on the motion of the Patients Compensation Panel for the purpose of claimant answering why the above-entitled proceeding should not be dismissed for failure to comply with an order of the Panel dated June 26, 1979, and all parties having been fully heard on said motion;

The Panel makes the following findings:

(1) That respondents in this proceeding have requested that their medical expert be permitted to examine claimant.

(2) That on June 26, 1979, the Panel ordered claimant to submit to a medical examination by respondents' medical expert and that during the medical examination, respondents' medical expert be allowed:

(a) to take a relevant history of the claimant;

(b) to perform what medical tests he deems necessary;

(c) to conduct the examination outside the presence of claimant's attorney.

(3) That claimant did submit to an examination outside the presence of her attorney by respondents' medical expert, but refused to give relevant medical history and refused to submit to EMG and nerve conduction studies. That in a prior medical examination by claimant's own expert, claimant did give a relevant medical history and submitted to EMG and nerve condition studies.

(4) In a report submitted on July 25, 1979, after the medical examination of claimant as set forth above, respondents' medical expert reported as follows:

> In order to arrive at a proper opinion reflecting my best effort in analysis it is necessary that I be able to review the history for circumstances of onset, prior symptoms, the pattern of the evaluation of symptoms, the changes that have occurred over time and the responses to treatment measures. All of these aspects are relevant to the points of disagreement except for the EMG studies. The only way I could handle that would be to repeat certain tests of nerve conduction and selected EMG muscle testing.
>
> It is generally accepted practice that the history is an important (perhaps the most important) aspect in analysis of neurological disorders.

(5) That respondents' medical expert seeks to conduct an examination of the same scope as that conducted by claimant's medical expert.

(6) That under these circumstances such an examination by respondents' medical expert is reasonable in scope.

(7) That the claimant has refused and still refuses to submit to a medical examination by respondents' medical expert of the same scope as that conducted by claimant's medical expert.

(8) That an independent medical examination, such as involved here, is not an adversary proceeding, but rather preparation and investigation for the hearing before the Panel.

NOW, THEREFORE, IT IS ORDERED that this proceeding be dismissed with prejudice.

Dated this *28th* day of August, 1979.

/s/ Frederick W. Miller
Frederick W. Miller
Attorney-Chairman
Patients Compensation Panel

Dated this *28th* day of August, 1979.

/s/ Jeffrey Kravat
Jeffrey Kravat
Director
Patients Compensation Panel

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT
BRANCH IX

SUSAN [illegible]ZUREK,
Petitioner,

v.

FREDERICK W. MILLER,
Attorney-Chairman, and
JEFFREY L. KRAVAT,
Director of the Patients
Compensation Panel,
Defendants.

TRANSCRIPT OF
PROCEEDINGS

Case No. 79 CV 4427

Hearing on Alternative Writ of Mandamus

Date:	October 16, 1979
Before:	Honorable William D. Byrne, Circuit Judge
Appearances:	Petitioner by Attorney Richard E. Rosenberg P.O. Box 546, 17 N. Franklin St. Janesville, WI 53545 and Attorney Michael J. Radtke from the Barry Goldberg offices in Chicago. Defendants Miller and Kravat by Assistant Attorney General Robert W. Larsen, State Department of Justice Madison, WI 53702

Intervening defendants Drs. Traul, Inman, Stormont and Kamstra and Monroe Clinic by
Attorneys Robert Studt and Peter M. Gennrich, 16 North Carroll St., Madison, WI 53703
Defendants St. Clare Hospital and Dr. D.C. Riese
by Attorneys Eugene O. Gehl and Curtis Swanson, 122 W. Washington Ave. P.O. Box 1767, Madison, WI 53701

(Appearances were recited for the record as listed on page 1)

THE COURT: Mr. Rosenberg.

MR. ROSENBERG: With the Court's permission, I would like Mr. Radtke from the Goldberg Offices in Chicago to make the presentation for the petitioner.

THE COURT: Mr. Radtke.

MR. RADTKE: May I proceed, your Honor?

THE COURT: Yes.

MR. RADTKE: Your Honor, this is a petition for an alternative writ of mandamus. I might briefly state the facts as to how it comes before the court this morning. It arises out of a claim which was before the Patients Compensation Panel established by the Wisconsin Statutes. Discovery had been taken in this administrative proceeding where depositions have been taken of the petitioner and various of the defendants. At the conclusion of the depositions of the defendants, a request was made for an independent medical examination of the petitioner, Susan Mazurek. At that time the petitioner's attorneys, recognizing that there is a right to the examination, requested that the scope

of the examination be stated. We were never given any clear parameters as to what the scope would be.

We expressed a concern about the petitioner giving a history to the examining physician and submitting herself to basic testing and, more particularly in this instance, nerve conduction study and an EMG. We also requested that an attorney from our office be present during the course of the examination. The parties were unable to agree upon this. As an alternative, we suggested that we would permit a history to be taken in the event that we could stipulate that the history would not be used for purposes of evidence at the hearing or at a subsequent trial, our position on that being that although the doctor would be an examining physician, in the event that the petitioner had made any inconsistent statements or placed herself in jeopardy so that her rights might be in jeopardy without having the advice of counsel, she could be hurt in that sense. This was not acceptable.

A motion was presented before the Chairman of the Patients Compensation Panel and an order entered that Ms. Mazurek submit herself to an examination, that she give a history, and the doctor was determined, and the date was determined, I believe. Ms. Mazurek did present herself to Dr. Eichman for an examination, but on instructions of her attorney she did not give a history and she did not submit to the testing which was requested. Subsequent to that time a motion was brought before the panel. Eventually a rule was issued to show cause and the case was dismissed.

We are before the court this morning on a writ, asking that that order of dismissal be vacated, that no further steps be taken to enforce the order or, in the alternative, to schedule this action for a hearing before the formal panel as expeditiously as possible.

The position we have taken, your Honor, is that the panel lacks the authority to dismiss a proceeding. I have submitted a memorandum on this point. I hope you have had an opportunity to review it.

* * *

MR. LARSEN: Specifically she [Mazurek] refused to give her medical history to the independent medical expert and she refused to submit to an EMG and nerve conduction studies. She refused to do this even though those matters and tests were within the scope of the medical examination that had been conducted by her own physician and even though they were inquiries that were deemed to be necessary by the appointed medical expert, Dr. Peter Eichman. She continued to refuse to submit to what was considered to be a necessary medical examination even when she was presented with an order to show cause why proceedings which she commenced should not be dismissed because of her refusal to cooperate.

Now the purpose behind the law under which these Patients Compensation Panels operate is to achieve an expeditious but just resolution of medical malpractice claims. In order to do that it's fundamental that the complainant be required to submit to a medical examination by an expert and to whatever medical examinations deemed to be necessary by that expert so that he can arrive at a proper medical opinion.

MR. ROSENBERG: Your Honor, I don't like to interrupt but I have to object to this line of argument since the issue is not before the Court as to whether the panel attorney correctly ruled in this case. The only issue is whether he has any authority, no matter what she did. So the background of his ruling is not really an issue before the Court, and I don't think it makes any difference what she did or didn't do. It's

whether or not the panel can dismiss the case, regardless of what she did.

THE COURT: This is argument; Mr. Larsen can continue to argue, and you can rebut.